

between parties in immediate occupation of a tangible immovable property, but is intended to apply where the disputed possession consists of receipt of rent from tenants in actual possession. That being so, we cannot limit its operation by any rule which would depend upon the area of the property in dispute.

It remains now to notice the third objection. It seems to us that, having regard to the admission made by the second party, that the first party was in possession of the two disputed pergunnahs till the month of February 1887, by receipt of rent from the tenants, it would not have affected the decision of the case at all, if it had been established that the second party, as alleged by her, had succeeded in inducing the tenants of almost the whole of the pergunnahs Habraghât and Khotaghât "to attorn to her by payment of rent to the officers appointed by her between the month of February 1887 and the following month of May, when the present proceeding was instituted." Such payment of rent for a *short* time would not amount to dispossession of the first party.

In this view we are supported by *Sarbananda Basu Mozumdar v. Pran Sankar Roy Chowdhuri* (1).

We are, therefore, of opinion that this rule must be discharged, and it is accordingly discharged.

H. T. H.

*Rule discharged.*

## ORIGINAL CIVIL.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.*

GOPAL CHUNDER SREEMANY (PLAINTIFF) *v.* HEREMBO CHUNDER  
HOLDAR AND OTHERS (DEFENDANTS).\*

1889  
*March 18.*

*Mortgage—Priority of mortgage—Intention of preserving a prior security presumed—Mortgagee—Mortgagor.*

On the 29th November 1882, *H* mortgaged to the plaintiff his one-third share in a house and garden to secure Rs. 1,000 with interest at 12 per cent.

On the 3rd January 1884, *H* mortgaged his one-third share in the same house to a third person to secure Rs. 1,000 with interest at 18 per cent.

\* Original Civil Appeal, No. 29 of 1888, against the decree of Mr. Justice Trevelyan, dated the 21st of August 1888.

(1) I. L. R., 15 Calc., 527.

1889  
ABHAYES-  
SARI DEBI  
v.  
SHIDHES-  
SARI DEBI.

1889

GOPAL  
CHUNDER  
SREEMANY  
v.  
HEREMBO  
CHUNDER  
HOLDAR.

On the 14th May 1884, *H* and his two brothers mortgaged to the plaintiff the entirety of the said house and garden to secure Rs. 3,400 with interest at 18 per cent.

This last mortgage recited the mortgage of the 29th November 1882, and a further loan of Rs. 100 by the plaintiff to *H*, and contained the following clause, "Now in order to liquidate the said debt, and on account of our necessity, we three brothers do this day mortgage to you whatever right, title and interest we have in the said two premises and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we are paying at the rate of Re. 1-8 per month."

*Held*, that the transaction of the 14th May 1884, did not amount to payment of the original debt, but was in reality a further advance and a fresh security for both the old debt and the fresh advance, on different terms as to interest, the old debt remaining untouched; but that even had the original debt been satisfied thereby, that fact would not have necessarily destroyed the security, the presumption being, unless an intention to the contrary were shown, that the plaintiff intended to keep the security alive for his own benefit.

*Gokaldas Gopaldas v. Purnamal Premsukhdas* (1) followed in principle.

ON the 29th November 1882, Herembo Chunder Holdar mortgaged to Gopal Chunder Sreemany, under a Bengali instrument of mortgage, an undivided one-third share in the house and premises No. 15, Nimoo Gossain's Lane in the town of Calcutta, and of, and in, a certain rent-free garden in the 24-Pergunnahs, to secure the repayment of Rs. 1,000 with interest at 12 per cent. per annum. On the 3rd January 1884, Herembo Chunder Holdar granted a mortgage of his one-third share in the said house to Bindobashinee Dossee to secure the repayment of Rs. 1,000 with interest at 18 per cent. per annum. Bindobashinee Dossee brought a suit on this last mortgage against Herembo Chunder Holdar alone, and obtained therein, on the 26th November 1886, a decree directing the repayment of the sum secured with interest and costs, and in default directing the mortgaged premises to be sold.

Prior to the 14th May 1884 (at which date Gopal Chunder Sreemany had received no notice of the mortgage to Bindobashinee Dossee), Herembo Chunder Holdar, being unable to repay to Gopal Chunder Sreemany the amount due upon his first mortgage, applied to him to continue the said loan and to make further advances, which the said Gopal Chunder Sreemany agreed to do, provided that Sarat Chunder and Benayak Chunder Holdar,

the owners of the remaining two-third shares in the said properties, would join in giving to him the security of their shares; and on the 14th May 1884, Herembo Chunder, Sarat Chunder and Benayak Chunder Holdar, mortgaged to Gopal Chunder Sreemany their shares in the said house and garden to secure the repayment of Rs. 3,400 with interest at 18 per cent. per annum.

This latter mortgage (which was a Bengali mortgage) after reciting the mortgage of the 29th November 1882, and the fact that a further advance of Rs. 100 had been made to Herembo Chunder, ran as follows: "In order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt." The mortgage of the 29th November 1882, however, was never in reality paid off, and it remained uncanceled in the hands of Gopal Chunder Sreemany.

On the 11th September 1888, Gopal Chunder Sreemany brought a suit on the mortgage of the 14th May 1884, making Herembo Chunder Holdar, his two brothers and Bindobashinee Dossee, defendants, praying that the mortgage of the 14th May 1884 might be declared to have priority over the mortgage of Bindobashinee Dossee, and that an account might be taken of what was due to him under the two mortgages of the 29th November 1882 and the 14th May 1884, and that Bindobashinee Dossee might be restrained from proceeding under the decree obtained by her.

The Holdar defendants put in written statements, which, however, set up no real defence; and Bindobashinee Dossee contended that, upon the proper construction of the mortgage of the 14th May 1884, the prior mortgage of the 29th November 1882 was extinguished; and she contended that her mortgage should have priority over the mortgage of the 14th May 1884.

TREVELYAN, J.—The only real question in this case is whether by taking a subsequent mortgage the plaintiff has lost his security under his first mortgage. (Here followed the facts as set out above.)

1889

---

GOPAL  
CHUNDER  
SREEMANY  
v.  
HEREMBO  
CHUNDER  
HOLDAR.

1889

GOPAL  
CHUNDER  
SREEMANY  
v.  
HERMBO  
CHUNDER  
HOLDAR.

The plaintiff is taking a new security from his original mortgagor and others; the interest charged is different. The new mortgage states that the debt has been paid off. The old deed remains with the mortgagee, but only as one of the title deeds: this is clear from the schedule of title deeds which includes it, and describes it as being paid in full. A comparison of this schedule with the schedule of the first mortgage, shows that this is one of the bonds described in the schedule of the second mortgage as having been paid in full.

This suit is brought for the purpose of declaring that the plaintiff's mortgage has priority over the mortgage of Bindobashinee.

Mr. Sale, for the plaintiff, has cited several cases, all of which I have considered. They are mostly cases of third mortgagees or purchasers of the equity of redemption, paying off the first mortgagees. As pointed out in the case of *Gopee Bundhoo Shantra Mohapattur v. Kallypudo Banerjee* (1), the question is one of intention; in that case the Judges relied upon the fact that the original bond remained in the hands of the creditor, but in this case it only remained as one of the title deeds. It seems to me quite clear the parties intended that the first mortgage should be wiped out altogether by the subsequent mortgage in favour of the plaintiff.

If that was their intention, they could not have expressed it in clearer language. There is the statement that the new loan is taken to liquidate the former debt. There is the statement that the old debt has been paid, and we find the old bond in the list of the title deeds, with a statement that it has been paid in full. In this state of facts it is impossible to say that the original security remained. A new contract of an entirely different description, and with a different rate of interest, was made with new persons. I think the intention is clear, and must declare that the plaintiff's first mortgage has no priority over the defendant Bindobashinee's mortgage. I must dismiss this suit, and the plaintiff must pay Bindobashinee's costs.

The plaintiff appealed.

Mr. Phillips and Mr. Sale for the appellant.

Mr. *Bonnerjee*, Mr. *Garth* and Mr. *Pogose* for the respondents.

1889

Mr. *Phillips*.—The question is whether the first mortgage is extinguished. There is no evidence of express intention either one way or the other. I submit the first mortgage was kept alive. The plaintiff made further advances and naturally required a better security; and the fact of taking a second mortgage did not show that he meant to lose any advantage he might have had under his first mortgage. There is a broad distinction between the case of a purchaser of an equity of redemption and a mortgagee. Slight evidence suffices to keep on foot the prior charge. *Gokaldas Gopaldas v. Puranmal Preamsukhdas* (1).

GOPAL  
CHUNDER  
SREEMANY  
v.  
HEREMBO  
CHUNDER  
HOLDAR.

The nearest case on the facts is that of *Golaknath Misser v. Lalla Prem Lal* (2), but the present case is even stronger than that, as here the plaintiff's interest was raised, whilst in that case it was diminished.

The case of *Adams v. Angell* (3) is not so strong as the present case, as it was a case of a mortgagee purchasing the equity of redemption. The rule applicable to such cases as the present is laid down in *Dart's Vendors and Purchasers*, 1041: *Phillips v. Gutteridge* (4); *Gangadhara v. Sivarama* (5); *Dullabhdas Devchand v. Lakshmandas Sarupchand* (6).

The Court below has not only disallowed priority to the plaintiff's mortgage but has dismissed the suit altogether, which is clearly wrong as regards the mortgagors, and has also refused the plaintiff an account.

Mr. *Bonnerjee*, for the respondents, contended that the second mortgage clearly showed the intention of giving up the first security, and cited *Averrall v. Wade* (7).

The judgment of the Court (PETHERAM, C.J., and WILSON, J.) was as follows:—

This suit has been brought to have it declared that two mortgages, dated the 29th of November 1882 and the 14th May 1884,

(1) I. L. R., 10 Calc., 1035.

(4) 4 De G. and J., 531.

(2) I. L. R., 3 Calo., 307.

(5) I. L. R., 8 Mad., 246.

(3) L. R., 5 Ch. D., 634 (641.)

(6) I. L. R., 10 Bom., 88.

(7) L. & G. (temp Sug.), 252.

1889

GOPAL  
CHUNDER  
SREEMANY  
v.  
HEREMBO  
CHUNDER  
HOLDAR.

in favour of the plaintiff, have priority over a mortgage, dated 3rd of January 1884, in favour of the defendant, Bindobashinee Dossee, and to realize such two mortgages by bringing the mortgaged property to sale.

The facts are as follows: On the 29th of November 1882, Herembo Chunder Holdar, one of the defendants, mortgaged his one-third share of a house in Calcutta and a garden in the 24-Pergunnahs to the plaintiff to secure Rs. 1,000 and interest at 12 per cent.

On the 3rd of January 1884, Herembo Chunder Holdar mortgaged his one-third share of the Calcutta house to the defendant Bindobashinee Dossee to secure Rs. 1,000, with interest at 18 per cent.

On the 14th of May 1884 the defendants, Herembo Chunder Holdar, Surut Chunder Holdar, and Benayak Chunder Holdar, mortgaged the whole sixteen annas of the two properties, included in the mortgage of the 29th November 1882, to the plaintiff, to secure Rs. 3,400 and interest at 18 per cent.

This last mortgage recites the mortgage of the 29th November 1882, and a further loan by the plaintiff to Herembo Chunder Holdar of Rs. 100, and proceeds, "Now in order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we will pay at the rate of 1-8 per mensem, and within 12 months from this day's date, we will repay the whole amount in full, principal as well as interest."

Upon these facts, Mr. Justice Trevelyan has dismissed the suit altogether, holding that by the transaction of May 24th, 1884, the debt of November 29th, 1882, was paid off, and the security created by the deed of that date satisfied and cancelled. It has been argued before us that, looking at the real nature of the transaction, it did not amount to payment of the original debt, but was in fact a further advance and a fresh security, and that even if the effect of the transaction was that the original debt was paid, that did not necessarily destroy the security, the real

test being what must the plaintiff be presumed to have intended to do under the circumstances if he had known all the facts.

It was also contended that if the defendants' contention was correct, the suit should not have been dismissed, as the plaintiff must be entitled, in any case, to some relief in the suit. In our opinion, all these arguments are valid and must be given effect to, and we are unable to agree with Mr. Justice Trevelyan in the conclusion at which he has arrived.

Looking at the construction of the deed of May 1884, we do not think the transaction amounted to payment of the original debt; but looking at what was done in fact, and not to mere words, we think that it was in reality a fresh advance upon fresh security being given for both the old debt and the fresh advance, and upon a fresh arrangement being made as to interest, but that the old security for the old debt remained untouched. Even if this were not so, and the old debt was paid by the new transaction, the cases of *Phillips v. Gutteridge* (1), *Adams v. Angell* (2), *Gokaldas Gopaldas v. Puranmal Premsukhdas* (3), and *Goluck Nath Misser v. Lalla Prem Lal* (4) show that that would not necessarily destroy the security; but that if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection. We can see nothing in this case to indicate a contrary intention on his part, and we think that the plaintiff here must be presumed to have had such an intention, and that in either view the security of November 29th, 1882, is still subsisting, and the plaintiff is entitled to a declaration that notwithstanding what has taken place, his mortgage of November 29th, 1882, has priority over that of January 3rd, 1884, in favour of the defendant Bindobashinee Dossee.

An account will be taken of what is due for principal and interest under the mortgage of November 29th, 1882, and of what is due for principal and interest under the mortgage of May 14th, 1884, and it will be declared that the amount due under the first mortgage is a first charge upon the property mentioned in that mortgage, and that the amount due on the mortgage

1889

GOPAL  
CHUNDER  
SREEMANY  
v.  
HEHEMBO  
CHUNDER  
HOLDAR.

(1) 3 De G. and J., 531.

(3) I. L. R., 10 Cal., 1035.

(2) L. R., 5 Ch. D., 634.

(4) I. L. R., 3 Cal., 307.

1889  
 GOPAL  
 CHUNDER  
 SREEMANY  
 v.  
 HEREMBO  
 CHUNDER  
 HOLDAR.

of May the 14th, 1884, is a charge upon the whole of the property mentioned in that mortgage, subject to a charge in favour of the defendant Bindobashinee Dossee for the amount due for principal and interest under her mortgage upon Herembo Chunder Holdar's one-third share of the house in Calcutta, and that the plaintiff do sell the properties not included in such last mentioned mortgage first.

In taking the accounts as between the mortgagors and the mortgagee, the amount found to be due under the mortgage of November 29th, 1882, minus the interest from November 29th, 1882, and May 14th, 1884, must be deducted from the amount found to be due under the mortgage of that date in order to arrive at the sum now due from the mortgagors, the Holdars, to the plaintiff, and for which he is entitled to bring the mortgaged properties to sale.

The plaintiff will be entitled to add his costs to his mortgage and, under the circumstances of the case, the costs of the defendant, Bindobashinee Dossee, should also be added to her mortgage.

*Appeal allowed.*

Attorney for the appellant: Baboo N. C. Bural.

Attorney for the respondents: Mr. C. N. Manuel.

T. A. P.

## FULL BENCH.

*Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice Tottenham.*

JOGGOBUNDHU MITTER (PLAINTIFF) v. PURNANUND GOSSAMI  
 AND ANOTHER (DEFENDANTS).\*

*Limitation Act (XV of 1857), Sch. ii, art. 142—Symbolical possession.*

On the 7th November 1868, certain property was purchased by one Gopal Dass Banerjee at a sale held in execution of a decree obtained against one Jogodanund Gossami. On the 8th January 1873, the purchaser obtained a

\* Full Bench on Appellate Decree, No. 2321 of 1887, against the decree of H. Mathews, Esq., Officiating District Judge of Nuddea, dated 5th August 1887, reversing the decree of Babu Nuffer Chunder Bhutto, Subordinate Judge of that district, dated the 22nd September 1886.

1889  
 March 21.